



CASE CLIPS

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CRIMINAL LAW ISSUES

PARTLOW v. STATE, No. 52A04-0103-PC-134, ___ N.E.2d ___ (Ind. Ct. App. Oct. 5, 2001).
MATHIAS, J.

[I]n December 1995, Partlow received a Bachelor of General Studies Degree from Indiana University, and two years were subtracted from Partlow's period of imprisonment. At that point, Partlow's revised release date became September 9, 2001. [Footnote omitted.] In June 2000, Partlow received a second Bachelor of General Studies Degree, with minors in criminal justice and criminology, and psychology of human development from Ball State University. However, in November 2000, the Classification Division of the Department of Correction denied Partlow credit for his second Bachelor's Degree because "[i]n order to get credit for a second degree, it must be in a different area of study." [Citation to Brief omitted.] . . .

....

The statute [IC 35-50-6-3.3 (Supp. 1999)] does not explicitly restrict or prohibit prisoners from attaining more than one degree at the same level and it does not specifically set forth areas of study prisoners may or may not concentrate on in their education. While the statute limits the amount of credit time a prisoner may earn while attaining degrees to the lesser of four years or one-third of a prisoner's total applicable credit time, it does not specifically restrict combinations of degrees that may be earned to reach the maximum credit of four years.

. . . In Moshenek v. Anderson, 718 N.E.2d 811 (Ind. Ct. App. 1999), an appeal from a trial court's summary denial of a petition for a writ of habeas corpus, Moshenek had earned two associate's degrees, each from different areas of study and different universities. The Department of Correction denied Moshenek credit for his second associate's degree stating that the Department only grants education credit for degrees at different levels. [Citation omitted.] This court, however, reversed the trial court and held that pursuant to rules of statutory construction used to interpret ambiguous statutes, the purpose of the statute is "to provide incentive to further one's education while incarcerated." [Citation omitted.] . . . Therefore, the court found that Moshenek was entitled to credit for both of his associate's degrees because although at the same educational level, they were in different areas of concentration. [Citation omitted.] . . .

Our case is very similar to Moshenek because Partlow has been denied credit for a second bachelor's degree based on the fact that both of his bachelor's degrees are in the area of general studies. . . .

We agree with the Moshenek court's discernment that the intent of the General Assembly in Indiana Code section 35-50-6-3.3 was to provide incentive to further one's education while incarcerated. This is also laudable public policy. Like the Moshenek court, we also believe that it is the role of the General Assembly to consider and enact any further limitations on educational credit one may earn while incarcerated.

....
DARDEN and VAIDIK, JJ., concurred.

ELLER v. STATE, No. 14A01-0011-PC-392, ___ N.E.2d ___ (Ind. Ct. App. Oct. 15, 2001).
MATHIAS, J.

[E]ller filed a petition for post-conviction relief, alleging that his guilty pleas were not entered into knowingly, voluntarily, or intelligently because the plea agreement resulted in him being convicted of two offenses in violation of double jeopardy principles. His petition requested that the State Public Defender be appointed to represent him, but he did not attach an affidavit of indigency. On September 26, the trial court ordered the State to file a written response to the petition, and on the same day the prosecuting attorney filed a one-sentence response requesting that the petition be denied because it was "factually and legally without merit." [Citation to Record omitted.] Two days later, the trial court entered the following order: "The Court, having considered the defendant's Motion for Post Conviction Relief and the State's Objection thereto, now denies the defendant's Motion for Post Conviction Relief." [Citation to Record omitted.]

....
In Sanders v. State, 273 Ind. 30, 401 N.E.2d 694(1980)], the defendant/petitioner filed a pro se petition that stated he had no funds with which to employ counsel and affixed an affidavit of indigency. The trial court summarily denied the petition without referring it to the State Public Defender. Our supreme court reversed,

Although Eller, unlike Sanders, did not include an affidavit of indigency, he did explicitly request the referral of his petition to the State Public Defender. Moreover, his indigent status was clear based on his pretrial representation by a public defender, his filing of an affidavit of indigency several months before the filing of his petition for post-conviction relief, and his present incarceration at the Department of Correction serving a forty-year sentence.

... [W]e do not believe the omission of an affidavit of indigency strips him of the right to referral and review of his case by the State Public Defender.²

[T]his case is remanded with instructions to forward Eller's petition to the State Public Defender's Office.³

....
²In Neville v. State, 663 N.E.2d 169 (Ind. Ct. App. 1996), we found no error in the trial court's failure to forward a petition for post-conviction relief to the State Public Defender when the petitioner did not attach an affidavit of indigency and did not complete the standard "form" questions about his ability to hire an attorney or his desire to be represented by the State Public Defender. Eller's circumstances are clearly distinguishable, however, as he explicitly requested referral to the State Public Defender and his indigency is clearly evinced from other parts of the petition and the record.

³Because we are remanding for referral to the State Public Defender, we need not address the merits of Eller's claim that his petition was improperly denied without a hearing. We would note, however, that a hearing is not required when "the pleadings conclusively show that petitioner is entitled to no relief." P-C.R. 1(4)(f). Eller's purely legal claim of a double jeopardy violation falls into this category. Nevertheless, the trial court's one-sentence denial order falls short of what is required by our post-conviction rules. Rule 1(6) requires trial courts to "make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held." P-C.R. 1(6).

BAILEY and BAKER, JJ., concurred.

CIVIL LAW ISSUES

SANJARI v. SANJARI, No. 20A05-0106-CV-236, ___ N.E.2d ___ (Ind. Ct. App. Oct. 4, 2001).
BAILEY, J.

Amir contends that his child support order is erroneous because it incorporates a deviation from the Indiana Child Support Guidelines ("Guidelines") for visitation rather than contemplating his status as a custodial parent. We agree.

Regarding child custody and child support, the Decree of Dissolution provides in pertinent part:

2. The parties are awarded the joint legal and physical custody of the minor children, to-wit: [A.S.], date of birth October 8, 1988, and [M.S.], date of birth September 11, 1992. The court is of the opinion that the parties are able to agree on periods of custody for each parent which are approximately equal in time and that no order for visitation will be entered.

5. Absent the shared custody of the children and based on the child support guidelines, the support obligation of the husband would be \$221.00 per week, after granting the normal 10% credit for visitation (child support worksheet attached as Exhibit 1).

The court, because of the additional time spent with the children over and above the regular guidelines of the court, finds that a deviation from the guidelines is in order and now sets support to be paid by the husband at \$175.00 per week beginning on June 16, 2000, and ending September 1, 2000. Beginning September 1, 2000, the husband's income increases to \$83,000.00 per year (\$1,596.00 per week), increasing the support, by chart, to \$268.00 per week. Again, allowing credit for extra visitation, the court sets support to be paid by the husband at \$215.00 per week beginning September 8, 2000.

[Citation to Brief omitted.] The thrust of the order is that Alison is treated as the custodial parent and Amir is treated as the non-custodial parent who exercises visitation. [Footnote omitted.] Such is contrary to the parties' agreement for joint physical custody, adopted and incorporated by the trial court into the Decree of Dissolution.

The Guidelines do not directly address the calculation of child support in circumstances where the parents have been awarded joint physical custody of their children. Nevertheless, in this situation we find instructive the following Commentary to Guideline 6 concerning split custody:

In those situations where each parent has physical custody of one or more children (split custody), it is suggested that support be computed in the following manner:

1. Compute the support a father would pay to a mother for the children in her custody as if they were the only children of the marriage.
2. Compute the support a mother would pay to a father for the children in his custody as if they were the only children of the marriage.
3. Subtract the lesser from the greater support amount.
4. The parent who owes the greater amount of support pays the difference computed in step 3, above.

The practical effect on child rearing expenses where each parent has two children half-time would presumably be analogous to the effect on expenses where each parent has one child full-time, the situation described in the foregoing Commentary. However, we do not suggest that all other support calculation methods are foreclosed in joint physical custody

situations. As the Commentary to Guideline 6 states “infinite possibilities exist in terms of time spent with each parent, travel between parents and other considerations.”

Here, however, the record reflects that the parents spend equal time with their children and live in the same geographical area. Moreover, there is no testimony that either parent incurs extraordinary medical expenses or extraordinary expenditures on behalf of the children. Finally, the child support worksheets in the record reflect that neither parent has a legal duty of support for a dependent other than the children of this marriage. Under these circumstances, we remand for a calculation of child support obligations of both parents consistent with the methodology described in the Commentary to Guideline 6. [Footnote omitted.]

....
BROOK and KIRSCH, JJ., concurred.

GIBSON v. HAND, No. 40A01-0105-CV-193, ___ N.E.2d ___ (Ind. Ct. App. Oct. 5, 2001).
RILEY, J.

The BMV raises one issue on appeal, which we restate as follows: whether the trial court erred in granting Hand a restricted commercial driver's license (CDL) during a period in which his operator's license was suspended due to a chemical test failure.

....
With the above in mind, we review the BMV's argument to determine whether it presents a prima facie case of error that the trial court improperly granted Hand's Petition. Ind. Code § 9-24-15-10 provides: “Notwithstanding any other provision of this chapter, an individual may not receive a restricted driver's license to operate a commercial motor vehicle if the individual's driving privileges are suspended for an alcohol or drug violation under IC 9-30-5 or 49 CFR 391.15.” The BMV admits that Hand's driving privileges were not suspended for an alcohol or drug violation under Ind. Code § 9-30-5 or 49 C.F.R. § 391.15. The BMV admits that Hand's driving privileges were not suspended for an alcohol or drug violation under Ind. Code § 9-30-5 or 49 C.F.R. § 391.15. In fact, Hand's driving privileges were suspended under Ind. Code § 9-30-6-9(b),

...
From this, the Court can only presume the General Assembly knows the difference between an administrative suspension under §9-30-6-9 and a court ordered suspension under IND. CODE §9-30-5-10. Had the General Assembly intended to prohibit operation of a commercial motor vehicle under §9-24-15-10 by a person administratively suspended, the Court can only presume they [sic] would have said so referring to IND. CODE §9-30-6-9. From a public policy standpoint, it is also logical the General Assembly did not intend to deprive people of a C.D.L. unless a court had decided they should be suspended after a conviction or finding of guilt and other protections afforded by due process and the presumptive [sic] of innocence.

[Citation to Brief omitted.] The BMV does not disagree with the trial court's analysis. Rather, it maintains that the Indiana Code sections mentioned above are preempted by federal law. . . . The intent of Congress to preempt state law may be expressed in a statute's language or implied in a statute's structure and purpose. [Citation omitted.] If the preemption question is not settled by a precise and narrow application of a statute's language, we must determine whether the state law in question actually conflicts with federal law. [Citation omitted.] “State law actually conflicts with federal law where it is impossible for a citizen to comply with both state and federal requirements or if state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” [Citation omitted.]

Additionally, 49 U.S.C.A. § 31311 provides, in pertinent part, as follows:

(a) General. —To avoid having amounts withheld from apportionment under section 31314 of this title, a State shall comply with the following requirements:

* * *

(10)(A) The State may not issue a commercial driver's license to an individual during a period in which the individual is disqualified from operating a commercial motor vehicle or the individual's driver's license is revoked, suspended, or canceled.

* * * *

This federal statute subjects Indiana to a potential loss of federal funding if it does not comply with 49 U.S.C.A. § 31311. Clearly, the trial court's grant of Hand's Petition directly conflicts with 49 U.S.C.A. § 31311(10), as it requires the BMV to issue Hand a restricted CDL during a period in which his operator's license was suspended due to a chemical test failure.

Consequently, we find that the BMV has presented a prima facie case of error. Although Indiana law does not deny Hand the issuance of a restricted CDL, the BMV has established that Indiana will be subject to a loss of federal funds if it issues Hand a restricted CDL. Thus, it would be impossible to issue Hand a restricted CDL in compliance with the law of Indiana without conflicting and/or creating an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, i.e. U.S.C.A. § 31311(10). See *Ziobron v. Crawford*, 667 N.E.2d [202] at 206 [(Ind. Ct. App. 1996), *reh'g denied, trans. denied.*] Therefore, we find that the trial court erred in granting Hand's Petition.

* * * *

SHARPNACK, C. J., and NAJAM, J., concurred.

JUVENILE LAW ISSUE

MATTER OF PATERNITY OF M. G. S., No. 64A03-0104-JV-120, ___ N.E.2d ___ (Ind. Ct. App. Oct. 11, 2001).

BAKER, J.

Appellant-petitioner Joel W. Wachowski appeals the trial court's judgment that his consent to the adoption of M.G.S., his minor daughter, is irrevocably implied because he failed to file a paternity action within thirty days of receiving notice of the proposed adoption in accordance with IND. CODE § 31-19-9-15. Specifically, Wachowski claims that: 1) the thirty-day time limit is not jurisdictional and the trial court erred in failing to consider any equitable deviations from the time limit;

* * * *

[W]hile an ordinary statute of limitations may be waived and is subject to equitable tolling, a nonclaim statute is not. [Citation omitted.] "A nonclaim statute is one which creates a right of action and has inherent in it the denial of a right of action. It imposes a condition precedent—the time element which is part of the action itself." [Citation omitted.] . . .

Thus, a statute is a nonclaim statute when "there is clearly evidenced a legislative intent in [the] statute to not merely withhold the remedy, but to take away the right of recovery where a claimant fails to present his claim as provided in the statute." [Citation omitted.] . . . While equitable principles may extend the time for commencing an action under statutes of limitations, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions. [Citation omitted.]

The plain language of I.C. § 31-19-9-15 indicates that it is a nonclaim statute. Specifically, I.C. § 31-19-9-15 clearly states that a putative father forgoes his right to establish paternity of the child if he fails to file his paternity action within thirty days of receiving notice of the potential adoption. Further, the jurisdictional nature of this time limit

is supported by I.C. § 31-19-3-4, which states that the putative father loses his right to establish paternity of the child “under 31-14 or in a court of another state when that court would otherwise be competent to obtain jurisdiction over the paternity action.” . . . From this language, it is reasonable to infer that if a foreign court is not competent to obtain jurisdiction over the paternity action when it is filed beyond the statutory time period, then a court of this state also lacks jurisdiction over the paternity suit when it is untimely filed.

. . . From the clear language of I.C. § 31-19-9-15 and the corresponding pre-birth notice and intervention provisions, it is apparent that no right of action exists outside of the thirty-day statutory time limit. Thus, I.C. § 31-19-9-15 is a nonclaim statute and is not subject to any equitable exception.

....

Because we have determined that I.C. § 31-19-9-15 is a nonclaim statute, we are bound to conclude that Wachowski’s consent to the adoption of M.G.S. was irrevocably implied because he failed to file a paternity action within the statutory time limit. However, we urge the General Assembly to reconsider the strict language and timetable set forth in the statute in order to prevent future injustice to a natural birth parent.

It is clear from the record that Wachowski intended to play an active role in his daughter’s life and had no intention of relinquishing his parental rights by consenting to the adoption. His delay in filing was a result of his reliance upon Soltysik’s assertions immediately after he received the pre-birth notice. Wachowski’s misplaced reliance and resulting delay in filing the paternity action, means that he may never see M.G.S. again or have a significant involvement in her life. In contrast, Soltysik will very likely have ample opportunity to visit M.G.S. and to take an active part in her life, as Soltysik’s sister and brother-in-law are actively seeking to adopt the child. Thus, while M.G.S. has been entirely separated from Wachowski and his family, she remains permanently attached to the Soltysik and her family.

....

FRIEDLANDER, J., concurred.

ROBB, J., filed a separate written opinion in which she concurred, in part, as follows:

I fully concur with the majority opinion, but write separately to address a means which may prevent an inequitable final resolution of this case and protect the "best interest" of M.G.S. [I] believe that the appointment of a guardian ad litem to represent M.G.S.'s interests at the adoption proceeding would be highly appropriate. . . . Although Wachowski's paternity petition is time-barred, a petition filed by M.G.S. would not violate the statute of limitations. A child may file a paternity petition at any time before he reaches the age of twenty. [Citation omitted.] If the child is incompetent, he may file the petition through his guardian, guardian ad litem, or next friend. [Citation omitted.] Thus, in my view the appointment of a guardian ad litem by the adoption court to represent M.G.S. may truly be the only way to safeguard the child's interests.

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